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FILED
FEB 26 1901
JAMES H. McKENNEY
Clerk.

Brf. of Webster for P.G.

IN THE

Supreme Court of the United States.

Filed Feb. 26, 1901.

OCTOBER TERM, 1900.

No. 550.

JOHN L. SHUMATE,
Plaintiff in Error,

vs.

AUGUST HEMAN,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF MISSOURI.

BRIEF FOR PLAINTIFF IN ERROR.

HIRAM J. GROVER,
HAMILTON GROVER,
G. B. WEBSTER,
Counsel for Plaintiff in Error.

Real Estate Ptg. & Pub. Co., 9 N. 8th St. Phones: Kinloch, B 1429; Bell, Main 2523 A.

STATEMENT.

This action was begun by the defendant in error in the Circuit Court of the City of St. Louis, Missouri, to enforce the lien of a special tax bill issued for the construction of a sewer in what is known as Vandeventer Sewer District No. 1 of that city.

The amount of the bill represented the proportionate part of the entire cost chargeable under the provisions of the charter of the city against a lot owned by plaintiff in error, which lies within the boundaries of that district.

A trial of the case resulted in a judgment establishing the lien, and in due course of procedure the case found its way to the Supreme Court of Missouri, where the judgment was affirmed, the report of the decision appearing in 156 Mo. at page 534. After an unavailing motion for a re-hearing, the case was brought here by a writ of error.

PETITION—(*Trans. pp.* 5-6).

The petition was in the usual form in Missouri for such actions, except in the following particulars:

(1) While the Charter specifically provides that the assessment of the cost of the construction of sewers shall be made by the Board of Public Improvements, as a Board, there is no allegation in the petition that the Board of Public Improvements, as a Board, made any assessment.

(2) While the petition alleges that there were ordinances directing a taxing or sewer district, and ordinances directing contracts to be made for the construction of sewers in the district, and the petition further states that "such ordinances were as follows, to-wit:" as a matter of fact, the ordinances were not inserted in, nor attached to, the petition as exhibits. The ordinances, however, were offered in evidence by plaintiff in error, and are found in the transcript pages 39 to 62.

THE ANSWER—(*Trans. pp.* 8-10).

The amended answer, on which the case went to trial, con-

tained a general denial and a cross-bill praying the cancellation of the tax bill. It was further averred that the enforcement and collection of said tax bill would constitute confiscation and deprive the plaintiff in error of his property without due process of law and take his property for public use without just compensation, contrary to the provisions of the fourteenth amendment to the constitution of the United States, because no valid assessment was made in the manner and form required by the City Charter and by the terms of the ordinances; that the provisions of the Charter of the City of St. Louis relating to the assessment of special taxes for construction of district sewers, and also the ordinances for the construction of the sewer involved in this case, were repugnant to and in conflict with the fourteenth amendment because they failed to provide for limiting the amount so assessed to the amount of value, or to the amount of benefit derived by the property of plaintiff in error from the improvement for which the tax was leived, and because no provision of the Charter or of the ordinances required the Municipal Assembly, or any other State or municipal agency, to find and determine that the property embraced in the taxing district, or the property of plaintiff in error, would be benefitted by the construction of the sewer, or to ascertain the amount of such benefit, if any, or the amount of such benefit over and above the benefit derived by the public generally, of the City of St. Louis, from the same improvement, and for the further reason that the City Charter and the said ordinances provide for the assessment of the cost of said sewer against the property in the taxing district by apportioning the whole cost of such construction and improvement between the lots according to their respective areas, without regard to the fact that, if the same were benefitted at all, the public in general and some of the abutting property would receive equal or greater benefits from the same improvement. It was alleged that the tax bill, though void for the foregoing reasons, was nevertheless a cloud on the title of plaintiff in error which ought to be removed, and cancellation of the bill was prayed.

THE REPLY—(*Trans.*, *p.* 11 .)

Defendant in error, by his reply, denied all the allegations of new matter contained in the foregoing answer.

THE EVIDENCE.

Defendant in error (plaintiff below) offered the following evidence at the trial:

1. **The tax bill sued on in this case.** (*Trans.*, *p.* 7 .)

It is regular on its face, and, as will be noticed, contains a certificate that the assessment was made by the Board of Public Improvements.

2. **Testimony of August Heman, defendant in error.** (*Trans.*, *p.* 13 .)

He identified the signatures of the city officials appearing upon the face of the tax bill, but all the remainder of his testimony was upon a branch of the case which is not before this court.

On behalf of plaintiff in error (defendant below) the following evidence was introduced:

1. **Testimony of Emory S. Foster, secretary Board of Public Improvements.** (*Trans.*, *p.* 30 .)

He identified all the portions of the record of the board relating to the construction of the sewer, and his testimony showed affirmatively that the assessment of the tax was made by the president of the Board of Public Improvements, and the several bills made out by him, although both were approved by the board when subsequently presented to it. The trial court, on the objection of defendant in error, refused to allow this witness to answer the question whether or not the record kept by him showed any action of the board determining whether or not the public was benefited by the construction. Exceptions to this ruling were duly saved, and urged upon the State Supreme Court on appeal.

Among the entries on the record of the Board of Public Improvements, identified and read by this witness, was one showing that the construction of the sewer in question was

determined upon and recommended by the board as a "sanitary measure." (*Trans.*, *p.* 31 .)

2. **Ordinance No. 13,076 of the City of St. Louis,** creating the sewer district. (*Trans.*, *p.* 37 .)

3. **Ordinance No. 13,482 of said city,** amending the foregoing ordinance by changing the limits of the district. (*Trans.*, *p.* 41 .)

4. **Ordinance No. 14,625 of said city,** amending both of the above ordinances by further changes in the limits of the district. (*Trans.*, *p.* 42 .)

5. **Ordinance No. 13,596 of said city,** providing for the construction of sewers in said district, being the same for which the tax bill in question in this case was issued.

The last section of the ordinance is as follows:

"SEC. 26. As soon as said district sewers with their inlets, manholes and other appurtenances are fully completed, the Board of Public Improvements shall cause to be computed the whole cost thereof and shall assess it as a special tax against all the lots of ground in said district respectively, without regard to improvements and in proportion as their respective areas bear to the area of the whole district, exclusive of public highways; and the board shall cause to be made out a certified bill of such assessment against each lot in the district in the name of the owner thereof. And said special tax-bills shall be made out by the president of said board and by him registered in his office in full and certified and delivered to the comptroller, and his receipt taken therefor and by him registered and countersigned and delivered to the party in whose favor they are issued for collection and his receipt taken in full of all claims against the city on account of said work." (*Trans.*, *p.* 56.)

6. **Ordinance No. 14,630 of said city,** amending the last mentioned ordinance by changing the route of the sewers in certain localities. The section above quoted (26) was not altered or amended in any way. (*Trans.*, *p.* 57 .)

Testimony of William Wise, Assistant Sewer Commissioner of St. Louis, relating principally to the character of the sewer and topography of the district. (*Trans.*, *pp.* 62-72.)

7. **Testimony of Robert E. McMath, President of the Board of Public Improvements, and former Sewer Commissioner of St. Louis.** (*Trans.*, *p.* 72 .)

This witness was asked whether any determination of the question of benefit to the public from the construction of the sewer in question was had, but on objection of the defendant in error the evidence was excluded. Plaintiff in error duly excepted and urged his exceptions upon the State Supreme Court on appeal. (*Trans.*, *p.* 72 .)

When asked by defendant in error to state whether the property in the district taxed was benefitted by the construction of the sewer, counsel for plaintiff in error objected to the form of the question because it merely called for a conclusion. The trial court said, "What has that question to do with the case, anyhow? I sustain the objection." (*Trans.*, *p.* 73 .)

MR. MCMATH testified that twenty-five acres not included in the taxing district were wholly drained into this sewer, although the owners thereof were not, and under the city charter could not have been taxed for any part of the cost of the sewer, and that public property to the extent of one hundred and twenty-five (125) acres, streets, and alleys within the taxing district, were also drained into the sewer, although none of the cost of construction was paid from the public funds, the entire amount thereof being assessed against the private property in the district. (*Trans.*, *p.* 73-74)

This was all the evidence in the case.

THE PROVISIONS OF THE ST. LOUIS CHARTER.

The portions of the St. Louis charter relating to special tax bills for the cost of district sewers are as follows:

"SEC. 22. Board to approve district sewer improvements—authority of assembly in reference to same—special taxes for district sewers—repairs to be paid by city. District sewers shall be established within the limits of districts, to be prescribed by ordinance as approved by the board of public improvements, and so as to connect with a public sewer, or some natural course of drainage. Such district may be subdivided, enlarged or changed, upon the recommendation of said board, by ordinance, at any time previous to the construction of the

sewer therein. The assembly shall cause sewers to be constructed in any district whenever a majority of the property holders resident therein shall petition therefor, or whenever the board of public improvements shall recommend it as necessary for sanitary or other purposes; and the character, dimension and material of such sewer shall be prescribed and may be changed, diminished, enlarged or extended, and such sewer shall possess all requisite laterals, inlets and other appurtenances. As soon as a district sewer, with its inlets, manholes and other appurtenances is fully completed, the said board shall cause to be computed the whole cost thereof, and shall assess it as a special tax against all the lots of ground in this district respectively, without regard to improvements, and in proportion as their respective areas bear to the area of the whole district, exclusive of the public highway; and the board shall cause to be made out a certified bill of such assessment against each lot in the district, in the name of the owner thereof, which shall be collected and paid in the manner hereinafter prescribed: Provided, that the repairs and other incidental expenses of district sewers shall be paid out of the general revenue."

"SEC. 24. Special tax bills—how made out.—All special tax bills for work contemplated by this Charter shall be made out by the president of said board, and by him registered in his office in full, and certified and delivered to the comptroller, and his receipt taken therefor, and by him registered and countersigned and delivered to the party in whose favor it is issued for collection, and his receipt taken in full of all claims against the city on account of said work."

"SEC. 25. Special tax bills to be a lien on property—manner of collecting same—city not to be liable for special tax bills, etc.— Said tax bill shall be and become a lien on the property charged therewith, and may be collected of the owner of the land, in the name of and by the contractor, as any other claim in any court of competent jurisdiction, with interest at the rate of ten per cent per annum, after thirty days from demand of its payment date; and if not paid within six months after such demand, then at the rate of fifteen per cent per annum from the date of said demand. In case the owner of the ground is a non-resident of the state, suit may be brought by attachment, which shall be a demand of its payment. Such certified bill shall in all cases be *prima facie* evidence that the work and material charged in such bill shall have been furnished and of the execution of the work, and of the correctness of the rates or prices, amount thereof, and of the ability of the

person therein named as the owner of the land charged with such bill to pay the same. Provided, that nothing in this section shall be so construed as to prevent the party charged with the payment of said bill from pleading, in reduction of the amount of same, that the work therein mentioned was not done in a good and workmanlike manner; and provided, that if the party charged shall set up, by way of defense, that the work was not done in a workmanlike manner, according to the class of work mentioned in the contract, and that such party before the commencement of the suit, tendered to the contractor the full value of such work as done, and shall establish the same on the trial, the recovery shall only be for the amount so tendered, and judgment for costs shall be rendered against the plaintiff. The city shall not be liable, in any manner whatever, for on account of any work done which is to be paid for in the manner provided in this section."

The Board of Public Improvements is required by Section 22 to do three acts, two of which it may delegate, but the third of which it must itself perform, thus:

(1) The said board shall cause to be computed the whole cost thereof. It is to be observed that this computation may be done by someone else, but, after being done, it must necessarily be approved by the board.

(2) The board shall assess it (the cost) as a special tax against all the lots of ground in the district. It is to be noted that the board is not allowed to "cause" the assessment to be made, but must make the assessment itself.

(3) The board shall cause to be made out a certified bill of such assessment against each lot in the district. It is to be observed that here, too the board may "cause" the certified bills to be made out, and it is not required to make out the bills itself.

The record of the board as read at the trial by Foster, the secretary, shows no action of the board causing the computation to be made, nor does it show that the board, as a body, ever performed the specific act of making the apportionment, or assessment of the tax against the lots of ground in the district. It does not even show that the board caused a certified bill of assessment against the property of plaintiff in error, or anyone else, to be made out.

The only record of any act of the board in connection with the apportionment of the cost of construction of this sewer is as follows:

"The president submitted special tax bills for the construction of sewers in Vandeventer Avenue Sewer District on August Heman, under contract No. 1,454, and 14,630, approved by the following votes: Ayes—Commissioners Homan, McMath, ———, Murphy and President Flad, 6. Noes—none." (*Trans.*, *p.* 38.)

It is contended by plaintiff in error that the burden was upon defendant in error to show a legal assessment, and that, having failed to do so, and it conclusively appearing from the evidence that no valid assessment ever was made, the judgment establishing the lien of the special tax bill against his lot was a taking of his property, to that extent, without due process of law, in contravention of the fourteenth amendment to the Constitution of the United States.

It is also contended that the ordinances under which this sewer was constructed, as well as the provisions of the city charter under which these ordinances were enacted, are unconstitutional and void, because in conflict with the fourteenth amendment, in that, by their terms, a betterment tax is imposed without regard to the question of corresponding benefits, and without notice of hearing thereon and opportunity to contest the existence of benefits to the property taxed, or the fairness of apportionment between the several lots of ground embraced in the taxing district.

These are the two questions involved in this case and now presented for determination.

ASSIGNMENT OF ERRORS.

Now comes John L. Shumate, plaintiff in error, and says that in the record, actions, judgments and judicial proceedings in the cause styled August Heman, plaintiff, against John L. Shumate, defendant, in the Circuit Court of the City of St. Louis, Missouri, as well as in the records, actions, judgments, judicial proceedings and opinions of the Supreme Court of Missouri, in the case styled August Heman, respondent, against John L. Shumate, appellant, which was and is the same identical cause aforesaid, there is manifest error, to the great prejudice and damage of said Shumate in this, to-wit:

I.

That the said Circuit Court of the City of St. Louis erred:

First. In finding and holding that upon the law and evidence in this case, the public of the City of St. Louis, and the City of St. Louis itself, was not benefitted by the construction of the said Vandeventer avenue sewer; it appearing fully and exclusively from the evidence that the said sewer was projected and recommended by the Board of Public Improvements, as a sanitary measure, necessary for the welfare of the whole people of the City of St. Louis, and that, in conformity with such recommendation of the Board of Public Improvements, the Municipal Assembly, by the ordinance aforesaid, directed and authorized the construction of said sewer for the purpose for which it was recommended; it appearing further from evidence that 125 acres of the property of the City of St. Louis, or 125 acres of the public property of the City of St. Louis, was intended to be and was actually drained by the said Vandeventer avenue sewer, through which all the drainage and sewage from the said 125 acres of public property was carried off and conveyed into the Mill Creek sewer, the latter being a public sewer of the City of St. Louis.

Second. In failing and refusing to find and hold, as prayed in the answer of plaintiff in error and urged in the motion for a new trial, that the provisions of Sections 18, 21, 22, 24 and

25 of Article VI. of the Charter of the City of St. Louis, and the Ordinances 13,076, 13,482, 14,625, and Ordinances number 13,596 and 14,630, and the contract with the defendant in error made thereunder and set out in plaintiff's petition, and assessment against plaintiff in error or his property for the cost of the construction of said sewer, were null, void and of no effect, for the reason that they are repugnant to and in contravention of the fourteenth amendment of the Constitution of the United States, and contrary to the provisions of Sections 20 and 21 of Article 11 of the Constitution of the State of Missouri.

Third. In not finding and decreeing, as prayed in the answer of plaintiff in error and urged in the motion for a new trial, that upon the facts and law in this case, as the general public of the City of St. Louis, and the City of St. Louis derived benefit from the construction and use of said sewer, the city, and the city alone, was liable for the value of the benefit inuring to the city and to the public of the city, by the construction and use of said sewer, should not have been assessed against the property and property holders in said district, including plaintiff in error and his property.

Fourth. In failing and refusing to find and decree, as prayed in the answer of plaintiff in error and urged in the motion for a new trial, that, upon the facts and law in this case, plaintiff in error and his property could not be made liable for any part of the cost of the construction of said sewer, beyond the actual benefit, if any, resulting to his property from the construction of said sewer.

Fifth. In finding and holding, against the contention of plaintiff in error in his answer and in his motion for a new trial, that, notwithstanding the failure of the aforesaid provisions of the Charter of the City of St. Louis, to-wit, Sections 18, 21, 22, 24 and 25 of Article VI., and of the said ordinances of said city, to-wit, Ordinances Nos. 13,076, 13,482, 14,625, 13,596 and 14,630, to provide and require that there should be an ascertainment and determination of the fact whether or not the city and the general public were benefited by the construction of said sewer, said provisions of said charter were valid

and not in contravention of the said provisions of the Constitution of the United States.

Sixth. In declining and refusing to declare and determine, as prayed in the answer of plaintiff in error and urged in his motion for a new trial, that the provisions of said charter and of said ordinances mentioned in the preceding paragraph, and any assessment thereunder, compelling the property owners so assessed, including the plaintiff in error herein, to pay and bear the entire cost of constructing said sewer, when the evidence showed that the City of St. Louis and the general public were actually benefited by the construction of said sewer, necessarily resulted in depriving the plaintiff in error herein of his property without due process of law, and in taking his property for public use without just compensation, and in depriving him of the equal protection of the laws, contrary to the provisions of the fourteenth amendment to the Constitution of the United States.

Seventh. In finding and determining, against the contention of plaintiff in error in his answer and motion for a new trial, that plaintiff in error, or his property, could be made liable for any part of the cost of said sewer, without a legal assessment being made therefor in the manner required by tne Charter of said City of St. Louis, and in the absence of any evidence of the making of such an assessment, which said finding and judgment deprives the plaintiff in error of his property without due process of law, in violation of the fourteenth amendment to the Constitution of the United States.

II.

That the Supreme Court of Missouri erred:

First. In not reversing the judgment of the Circuit Court of the City of St. Louis against the plaintiff in error in said cause, because of the several errors of said Circuit Court in its actions, rulings, judgments and judicial proceedings, the same being the errors hereinbefore specified and set out at length.

Second. In finding and determining, against the contentions of plaintiff in error, made in said Circuit Court and repeated in said Supreme Court of Missouri, that he or his property could be made

liable for any part of the cost of said sewer without a legal assessment being made therefor in the manner required by the Charter of said City of St. Louis, and in the absence of any evidence that such assessment was made, by which said finding and judgment the property of plaintiff in error was, to the extent of said judgment, taken without due process of law, in contravention of the fourteenth amendment of the Constitution of the United States, the protection of which was duly invoked by plaintiff in error in said Supreme Court.

Third. In finding, holding and determining, against the contention of plaintiffs in error, that the opinion and judgment of the Supreme Court of the United States in the similar case of Norwood vs. Baker, 172 U. S. 269, were not binding and conclusive upon it, the said Supreme Court of Missouri, in contravention of the provisions of Article VI (2d paragraph) of the Constitution of the United States.

Fourth. In overruling a motion for the rehearing of said cause duly, and within the time required by law, made and presented to said Supreme Court by plaintiff in error, which said motion was based upon the several errors in its actions, rulings, judgments and judicial proceedings, as above set forth, and in the actions, rulings, judgments and judicial proceedings of the said Circuit Court of the City of St. Louis, more specifically hereinbefore set forth, to which reference is now here made.

WHEREFORE, for these and divers other reasons and causes, apparent on the face of said records, to-wit: the record in the cause of August Heman, plaintiff, against John L. Shumate, in the said Circuit Court of the City of St. Louis, and the record in the same identical cause in the Supreme Court of Missouri, there styled and designated as August Heman, respondent, against John L. Shumate, appellant, the said John L. Shumate, plaintiff in error herein, now prays that the said actions, rulings, judgments, opinions and judicial proceedings heretofore, had, as aforesaid, in said cause in the Circuit Court of the City of St. Louis, and the Supreme Court of Missouri, may be reversed, set aside and for naught held and esteemed, and that judgment here in this court, the Honorable Supreme Court of the United States, may be entered in favor of him, the said John L. Shumate.

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BRIEF.

I.

The judgment establishing the lien of the tax bill against the property of plaintiff in error constitutes a taking of his property without due process of law.

(*a*) There can be no valid tax without a valid assessment.

St. L. & S. F. Ry. Co. v. Apperson, 97 *Mo.* 306, *l. c.*
State ex rel. v. Wabash R. Co., 114 *Mo.* 1.
Worthington v. Whitman, 67 *Iowa*, 190.
San Luis Obispo v. Pettit, 87 *Cal.* 499.
Graves v. Bruen, 11 *Ill.* 431.
Cooley, Taxation (2*d Ed.*), 352.

The assessment must be made in the manner provided by the statute which authorized the taxation, and a departure in any material part is fatal.

Blackwell, Tax Titles (2*d Ed.*), 255.
Dillon, Mun. Corp. (4*th Ed.*), *Sec.* 769.
Lyon v. Alley, 130 *U. S.* 177.
Marx v. Hanthorn, 148 *U. S.* 172.
Campbell Co. v. Taylor, 8 *Bush.* 206.
Westfall v. Preston, 49 *N. Y.* 353.
St. L. & S. F. Ry. Co. v. Apperson, 97 *Mo.* 306, *l. c.*

This is especially true of special assessments for local improvements.

2 *Desty, Taxation, p.* 1331.
Cooley, Taxation (2*d Ed.*), *p.* 659.
Cameron's Case, 50 *N. Y.* 502.
Sharp v. Speir, 4 *Hill*, 76.
Warren v. Grand Haven, 30 *Mich.* 24.
Henderson v. Casey, 3 *Bush.* 698.
St. Louis v. Rankin, 96 *Mo.* 497.

Where a board is required to make the assessment, that duty can not be performed by an individual member or an employee.

Metcalfe v. Messenger, 46 *Barb.* 325.

Middletown v. Berlin, 18 Conn. 197, l. c.
People v. Hager, 49 Cal. 229.
Oteri v. Parker, 42 La. Ann. 374.
Belfast Bank v. Kennebec Land Co., 73 Me. 404.

(*b*) These liens are creations of law and to establish them every step prescribed by law must be taken. Proceedings for the enforcement of such liens are *in invitum* and must be strictly construed.

Leach v. Cargill, 60 Mo. 316.
Kiley v. Oppenheimer, 55 Mo. 374.
Church v. People, 179 Ill. 205.
Stockton v. Whitmore, 50 Cal. 554.

(*c*) The petition filed in this case failed to allege any valid assessment, and the defendant in error failed to prove any at the trial. In truth no such assessment was even made, as the testimony of Foster at the trial (*Trans. p.* 38) and the records produced and identified by him (*Trans., p.* 38) clearly show.

In these circumstances the judgment was confiscatory in its nature and violative of the rights of plaintiff in error under the fourteenth amendment.

(*d*) The tax bill itself contains no evidence that an assessment had been made. The tax bill is not in itself an assessment. The charter, as we have seen, requires three specific acts to be performed. (1) The cost must be computed, and that the board may cause to be done. (2) The cost, when computed, must then be assessed against the property by the judicial act of the board itself. The board can not cause that to be done. (3) After the assessment has been made by the board of the entire cost against all the property in the taxing district, the board may then "cause" special tax bills to be made out. Neither the computation of the cost, not the making out of the tax bills can constitute the assessment. The putting in evidence of the fact that the cost was computed, and that the special tax bills were made out by the president of the board, afford no evidence whatever that an assessment was made by the board. The offering in evidence of the tax bills can not supplement the defect. The tax itself does not prove that an assessment was made.

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(*e*) Sec. 25, Art. VI, of the St. Louis Charter does not dispense with proof of the necessary allegation of the petition; but only provides that the special tax bill shall be *prima facie* proof of the allegations necessary to constitute a cause of action in a petition for the enforcement of the lien of a special tax bill.

The special tax bill can not be *prima facie* evidence of a necessary fact, which has not been alleged in the petition. It is only *prima facie* evidence of necessary facts which are pleaded.

II.

The provisions of the Charter of the City of St. Louis (Sec. 22, Art. VI.), and those of the city ordinances under which this special tax was levied, are in conflict with the provisions of the fourteenth amendment to the Constitution of the United States, and are therefore null and void.

1. They exclude from the assessment any consideration of corresponding benefits.

2. They provide no notice or opportunity to appear and contest the existence of alleged benefits, or the fairness of the apportionment of such benefits, if any exist.

3. They fix the proportion of the tax to be borne by each lot solely by a mathematical calculation, so that the assessment depends on the size of the lot alone, and not upon the benefit derived from the improvement.

Any assessment of special taxes under a law which does not afford the property owner an opportunity to be heard on the question of benefits and the fairness of the apportionment of the tax, and does not empower the municipal authorities to consider this question in fixing the assessment is a nullity, and any law which excludes from the assessment of such taxes the question of corresponding benefits is unconstitutional and void.

Dillon, Mun. Corp. (4th. Ed.), Vol. 2, pp. 932, 936.
Asberry v. City of Roanoke, 91 Va. 562.
City of Detroit v. Chapin, 112 Mich. 588.

Weed v. City of Boston, 42 L. R. A. 642.
Violett's Heirs v. City Council, 23 S. E. 909; 92. Va. 561.
Hammett v. Philadelphia, 65 Pa. St. 146.
State v. Newark, 37 N. J. L. 415.
Norwood v. Baker, 172 U. S. 269.
Hutcheson v. Storrie, 51 S. W. 848; 92 Texas, 685.
Fay v. Springfield, 94 Fed. 409.
Charles v. City of Marion, 98 Fed. 166.
Cowley v. Spokane, 99 Fed. 840.
Lyon v. City of Tonawanda, 98 Fed. 361.
Walsh v. Barron, 55 N. E. 164; 61 Ohio St. 15.
Parker v. Detroit, 103 Fed. 357.
Bidwell v. Huff, 103 Fed. 362.
Adams v. Shelbyville, 154 Ind. 467.

III.

The decision and opinion of this court in Village of Norwood v. Baker, 172 U. S. 269, was binding upon the Supreme Court of Missouri, and it was error on the part of the court to decline to follow it.

U. S. Const., Art. VI., Par. 2.
Black v. Lusk, 69 Ill. 70.
Bank v. Morgan, 28 Pa. St. 452.
Cabanne v. Lindell, 12 Mo. 189.

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ARGUMENT.

The Charter of the City of St. Louis prescribes the manner in which special taxes for the cost of the public improvements shall be assessed. By the terms of Section 22 of Article VI. of that instrument, the Board of Public Improvements is required to make an assessment for the cost of construction of district sewers such as that involved in this case. The section has already been set out in full in the statement (ante. p. 5.), and an examination of it shows that the board may **cause** the cost of such work to be computed and may **cause** the tax bills to be made out, but **must make** the assessment; the ministerial acts may be delegated, but the *quasi* judicial act must be performed by the **board as an organization.** The petition filed by the defendant in error in the State Circuit Court did not allege any assessment by the board, but contained the averment that "the president of the Board of Public Improvements computed the cost thereof and levied and assessed the same as a special tax against each lot of ground chargeable therewith." This does not meet the requirement of the city charter and the petition therefore failed to state one of the facts necessary to be proved to establish a lien.

Proceeedings for the enforcement of liens upon local assessments are in derogation of common right and those who prosecute them are held to a greater strictness of both pleading and proof than any other class of litigants. The validity of the lien depends upon the substantial compliance with every step required by law.

2 Desty Taxation, p. 1331.
Stockton v. Whitemore, 50 Cal. 554.
Leach v. Cargill, 60 Mo. 316.
Warren v. Grand Haven, 30 Mich. 24.

Such is the rule in all the states.

Unless it is alleged and proved that every step required by law has been taken, the lien can not attach.

In this case the right to judgment is predicated upon the

proper performance of each and every act designated by the charter of the city. One of those acts is the assessment of the tax by the Board of Public Improvements. Yet, nowhere in the petition do we see any averment of such action by that body. Indeed, the contrary appears, for it is stated that the act was performed by the president of the board, and the statement excluded possibility of presumption that it was the deed of the entire body acting as an organization. The case is no different from that of the president of a business corporation assuming to perform the functions of the board of directors and thus give to his individual acts the validity which the law says shall come only from the approval of the whole body. It will not do to say that the board as a body afterwards ratified the act, for ratification can bind none but those who ratify, and their rights are not in question here. Moreover, mere acquiescence can never suffice where the law requires positive action. To so hold would be to announce a doctrine so broad as to be dangerous and likely to bring about a degree of laxity in public affairs exceedingly detrimental to the public welfare.

Defendant in error could prove no more than he alleged and hence his petition, omitting as it did a fact essential to his recovery of judgment, was insufficient in law.

Not only was there lack of an allegation in the petition that the Board of Public Improvements made the assessment, but the evidence failed to show any such state of facts. Indeed, it appeared conclusively that the assessment was made as the petition stated, by the president of the board. According to the record of the board (Trans., p. 38), "the president submitted special tax bills for the construction of sewers in Vandeventer avenue sewer district," etc. If he submitted them, they were certainly made out, and if they were made out the act of assessment had been performed and nothing more remained. The subsequent approving vote of the board neither added to nor took from them. They were complete without that and so was each particular one. Both the levy and the apportionment were complete.

The City Charter constitutes this Board a Board of Assessors for special taxes. It gives them a power judicial in its character and to be used exclusively for public purposes, and

that such a power when conferred upon a body or two or more persons can be exercised only by a majority of the body acting together, is well settled law. One member alone can not do it; even though he be president of the body.

The rule is well stated by the Supreme Court of Connecticut in Middleton vs. Berlin, 18 Conn. 197 *l. c.* where it was said: "This pretened assessment list was in no sense the act of the board appointed by the inhabitants of Middleton to value and equalize their property.

"That board consisted of five persons, but this paper is the partial and unauthorized act of one man only.

"The rule governing the execution of private and public powers has long been settled. A power conferred upon two or more persons, by individuals, for private purposes, must be exercised by all, unless it be provided by the act conferring the power that a less number may effectuatly execute it; but an authority imposed by law, for public purposes, and especially for purposes of judicial character, may be exercised by a majority, if all have been legally notified to act.

"It is believed that no case can be found which will justify the performance of an aggregate duty by one only, as has been attempted here."

Accordingly, in that case, the assessment made by one member of a board of five was held illegal and void.

In Metcalfe vs. Messenger, 46 Barb. 325, the same question was discussed. There it was claimed by the defendant that the assessment sued upon was made by one member of the board alone, instead of by the whole board or a majority, and the court after a finding that such was the fact, said:

"One assessor can not make any assessment. It is the act of all or a majority of the assessors. There seems to be no answer to this objection, and that the assessment was irregular and void."

The law under which the assessment involved in that case was made put the power of assessment in a board composed of several members, but nevertheless a single member performed the act of assessing just as it was done in the case at bar.

It has already been seen that the petition of defendant in

error alleged the assessment in this case to have been made by the president of the Board of Public Improvements, instead of by the board itself as required by the charter, and that the allegation was fully sustained by the evidence on the other side of the case. In such circumstances nothing remains but to apply the settled law to the undisputed facts. Doing so leads to the necessary conclusion that there was no valid assessment of the special tax here in issue.

The Supreme Court of Missouri has, with the appellate courts of most of the states, decided that the assessment is the basis of taxation, and that there can be no tax without a valid assessment. It was so held in St. L. & S. F. Ry Co. v. Apperson, 97 Mo. 306, and in State v. Wabash Ry. Co., 114 Mo. 1; and Judge Cooley, in his work on Taxation (2d Ed., 352), reaches the same conclusion after citation of numerous cases. If these authorities correctly state the law, it necessarily follows that there was never any valid assessment of the tax in dispute here. The allegations of the petition admit and the evidence conclusively shows it.

However, it may be urged that the failure of the assessment raises no question of which this court can take cognizance. In answer to that, it is proper to say that this case does not fall within the class of cases where it is held that the method of assessment and collection of taxes is a matter for the determination of the states themselves, and that therefore the legality of the method adopted will not be reviewed by this court.

Here the objection is that the method adopted by the state authorities was not followed, and that a judgment was rendered and lien established without that which the state has designated as due process of law. It is such cases precisely that the fourteenth amendment was intended to cover, and the plaintiff in error, having claimed the protection of that provision, on the particular point, in the trial court, the question raised is properly within the jurisdiction of this court to determine.

Speaking on this point, Mr. Guthrie, in his valuable and interesting work on the Fourteenth Amendment (page 104) says: "The conclusion at which we must arive from a consideration of the authorities is that the systems and forms of legal

procedure adopted by the states, and impartially administered, will usually be held by the Supreme Court to be due process of law as far as the fourteenth amendment is concerned. * * * When, however under the pretense of altering or regulating the mode of enforcing the remedy, the statute clearly invades some substantive right, or when a statute, harmless on its face, is systematically enforced in a violation of fundamental rights, or when a court, transgressing its function, attempts to render a judgment without jurisdiction of the subject matter or notice to the party, the procedure is not due process of law, and may be declared void and set aside by the courts under the jurisdiction conferred by the fourteenth amendment."

In other words, while the state may establish its own system of taxation and, when established, it will amount to due process of law, yet, after the adoption of the system, it can not arbitrarily disregard and dispense with the procedure it has itself set up.

And the reason is plain, upon the most casual consideration. The term "due process of law," in matters of taxation, means "such process as is adapted (adopted?) to enforce a lien or specific charge upon the property specially assessed." So said the Supreme Court of Missouri in Neenan vs. Smith, 50 Mo. 525, and that the failure to observe and comply with such process is not due process of law follows as a corollary of the proposition.

Nor does the fact that the Supreme Court of Missouri affirmed the judgment establishing the lien in this case militate against the argument here advanced. If the assessment is an element of due process of law, it is no more possible for that court to render a valid judgment for a tax without an assessment than it would be to render judgment against a person of whom it had never acquired jurisdiction, and the one is as much a denial of due process of law as the other. The prevention of such results was the very object of the fourteenth amendment, and this court so declared in O'Keys case, 4 Wheat., 233-244, in Hurtado v. California, 110 U. S. 516, Yick Wo v. Hopkins, 118 U. S. 356, and many other similar cases. If the courts of a state may render judgments in the absence of jurisdictional facts, it is difficult to understand what this court meant when it said in

Kemmler's case, 136 U. S. 488, that the fourteenth amendment "forbids any arbitrary deprivation of life, liberty or property." If our contention that there was never any valid assessment, according to the law of Missouri, against the property of plaintiff in error, is correct, then it necessarily follows that the protection guaranteed him by the fourteenth amendment, and claimed by him, both in the trial court and in the State Supreme Court, was denied.

The ordinances of the City of St. Louis providing for the construction of the Vandeventer avenue sewer, as well as the provisions of the City Charter which have already been quoted, are assailed as violative of the fourteenth amendment to the Federal Constitution, in that, by their terms, a betterment tax is levied against the property of plaintiff in error, without regard to the question of corresponding betterments, and without notice of a hearing on that question, or opportunity to contest the existence of such benefits or the fairness of the apportionment of such benefits as may result between the several owners of the property within the taxing district.

It is contended here that the legislature has no power to authorize a municipal corporation to thus arbitrarily diminish the property of its citizens, or to give into its hand a method of assessment of special taxes which would in its application have that result, and that an assessment made under such an unrestricted rule is in itself illegal and void.

The betterment tax, or local assessment, is a subject which has long engaged the attention of the courts. It is not new, either in law or history. Even since 1427, when the statute of 6 Henry VI., c. 5, was enacted to prevent damage from inundation of the sea and to "apportion the work, or the expenses thereof, on those whose lands receive benefits therefrom," it has burdened those who have ever provided the greater part of the public revenue without enjoying any increased advantages, the owners of real estate.

Every theory of law has been strained to support this extraordinary power of government.

It was first supported upon the right of eminent domain.

People v. Brooklyn, *6 Barb. 209.*

Chicago v. Larned, *34 Ill. 276*, *l. c.*

But that gave too much opportunity to the property owner, and confined the exercise of the power to clear cases of public use.

Then resort was had to the police power of the state to abate nuisances.

Keese v. Denver, 10 Colo. 112.

But that was abandoned when it was made to appear that the owner may lawfully abate his own nuisance and save the profit of the contractor.

So in time the power to make these assessments was driven for refuge to the broad ground of the general taxing power, where it has since remained, and by the limits of which it must now be confined.

From the very first historical reference to this species of taxation, it is to be seen that the special benefit resulting to the property burdened was the justification for its imposition. Thus, in the "Inundation Acts" of 1427 (6 Henry VI., c. 5) the work, or its expense, was "apportioned among those whose lands received benefits therefrom;" and so it was in the act of 1667, providing for the rebuilding of London after the great fire of the preceding year.

19 Chas. II., c. 3.

There the mayor and aldermen were given power to cause the construction of drains, sewers and vaults, and to "impose any reasonable tax upon all houses within the said city and the liberties thereof, in proportion to the benefit they shall receive thereby for and towards the new making, cutting, altering, etc., and all and singular of the said vaults, drains, sewers, pavements and ditching aforesaid."

And so in the amendatory act of 7 Anne, c. 9.

The resulting benefit was recognized as essential in the earliest French legislation on the subject.

Clement, La Police sous Louis XIV., 144.

And so it is in that of Germany.

Preussisches Stadtrecht, pp. 375-386.

The theory of a corresponding benefit resulting from the improvement for the cost of which the assessment is made is the foundation of the right to make the levy, and this has long

been the contention of the courts and the textwriters in their attempts to distinguish it from fees, tolls, licenses and general taxes.

In re Mead, 74 N. Y. 216.
Macon v. Patty, 57 Miss. 378.
Hale v. Kenosha, 29 Wis. 599.
Birmingham v. Klein, 89 Ala. 461.
McCormick v. Patchin, 53 Mo. 33.

If there is no benefit there should be no tax, and if there be a benefit the tax should not exceed it in amount. This much, no doubt, our opponents concede, but we part company with them when we go one step further and say that there is no difference between benefits which do not exist at all and those which exist only by means of an arbitrary presumption. But, in either case they are lacking in fact and in the essential element of the right to impose the tax is absent.

If it be true that this right rests upon the corresponding benefit, then a rule of assessment and apportionment which expressly excludes consideration of the existence of that upon which the right rests must of necessity impair that right itself. The structure can not stand without its foundation.

"*Sublato fundamento cadit opus.*"

If the question of benefits is not considered, how can it be said that the assessment is made upon the resulting betterments? Can courts or legislatures say that in every case the resulting benefits are dollar for dollar and cent for cent the same amount as the cost of the improvement, and that each lot is benefitted in such proportion as its area bears to the whole district taxed? Such a presumption is as violent as it is arbitrary, and yet that is just what was indulged in here.

The city charter and the ordinances in question here assume, without anything upon which to base the assumption, that from the improvement for which the tax is levied there will be benefits, that those benefits will equal the exact cost and that each lot will receive the proportion of benefit which the size of each bears to the size of the whole district, after first deducting the area of the streets and alleys in the district. Even though it be admitted that abutting lots are necessarily bene-

fitted by the construction of a sewer, it does not follow that the benefits are equal to the total cost of construction, nor that each lot receives the proportion of benefit which its size bears to the size of the entire taxing district, after deducting the area of streets and alleys in the district. The fallacy of such a contention must be apparent on a moment's reflection. It lies in the fact that it determines a pure question of evidence by means of a mathematical calculation, yet this is the reasoning of the Supreme Court of Missouri and of all the courts which uphold assessments under statutes similar to the St. Louis Charter. They ignore the fact that the benefits may in reality be far less than the cost assessed, although the statute legislates the two into equality.

A recent example of the error into which these courts have fallen is furnished by the case of Conde v. Schenectady, 58 N. E. 130, where the objections of the property owner were disposed of by saying "that the land abutting on the street is benefitted by the pavement or re-pavement of the street, and should bear the expense, seems clear." But did it seem clear how much it was benefitted, or in what proportion the several lots taxed were benefitted? Every man knows that some lots receive a greater benefit than others from the same public improvement, and that the one receiving the greater benefit may be and often is the smaller in frontage or area, and courts will not pretend to be more ignorant than the rest of mankind.

In such cases the rule of assessment required by the St. Louis charter would be most unfair. One case proves the possibility of others, and how can they be separated under such a scheme of taxation? It is no answer to say that there are but few such cases. That is but a begging of the question. The vice of the method of assessment under the charter of St. Louis lies in the possibility of injustice which it presents.

Section 22, of Article VI, of the Charter of the City of St. Louis requires that, "as soon as the work of construction of a district sewer is fully completed, the Board of Public Improvements shall cause to be computed the whole cost thereof and shall assess it as a special tax against all the lots of ground in the district respectively without regard to improvements,

and in proportion as their respective areas bear to the area of the whole district, exclusive of the public highway."

This rule of assessment and apportionment is mandatory. It is a mere matter of mathematical calculation—a hard and fast rule which neither chance nor circumstance can change or alter. No other sum can be assessed against a lot than its proportion of the whole cost according to its area, and each must bear the burden of that amount, benefit or no benefit. The slightest variation from the result of the mathematical computation would invalidate the whole levy. The fixed rule of calculation, admitting of no relaxation, conclusively fixes upon the property owner the amount which he has to pay: Neither the assessor nor the assessed has any discretion or choice. Where such conditions exist, the law or ordinance authorizing the assessment is unconstitutional and void, irrespective of the question whether or not the property was actually benefitted to the amount of the tax.

And this is true because it rests upon a basis which excludes consideration of that which gives rise to the right to tax, the corresponding benefit.

The illegality is in the assessment, not in the amount assessed. Such a proceeding accomplishes the taking of private property for public use without just compensation and the diminution of the property of the citizen without due process of law.

The argument now advanced received the sanction of this court in what is commonly known as the Norwood case, 172 U. S. 269, where it was held that,

1. A state legislature can not confer on a municipal corporation authority to make an assessment for the cost of a public improvement conclusive on a property owner without providing him an opportunity to contest the question of corresponding benefits.

2. Any such assessment made under a law which does not afford the property owner an opportunity to be heard on the question of benefits and the fairness of tax, and does not empower the municipal authorities to consider this question in fixing the assessment, is a nullity.

These declarations of law apply with equal force in all cases where a like defect exists in the mode of levying the assessment, whether the improvement for the cost of which it is levied to be the construction of a street, alley, sewer or sidewalk, or the opening of a new street.

The method or rule of assessment is the issue in such cases, not the amount assessed, nor the purpose for which it was assessed. It was not the particular facts of the Norwood case which called forth that decision, but rather the disregard of constitutional rights underlying the rule of assessment there adopted. The assessment in that case was held invalid, not because the tax imposed exceeded the benefit, but because if it had the municipal authorities, under the statute authorizing the assessment would have been without power to correct the wrong and relieve the owner.

True, the Norwood case was a street-opening case, but that can not make any difference in the law pertaining to assessments for making streets or sidewalks, or building sewers, when the power involved rests on the same foundation.

The Supreme Court of Missouri, like the New York court in Conde's case (58 N. E. 130), labored to distinguish the Norwood case from cases involving assessments for construction of streets or sewers. It was said that, in the former, the issue was over a street opening and that the power of eminent domain was involved, while in cases such as that at bar, the assessment is made in the exercise of the power of taxation.

It is easy to see where the state court fell into error in its attempt at distinction. There was no dispute in the Norwood case over the right to compensation, but the question was how the expense should be assessed, and it would not have been otherwise had the abutting property been owned by some person other than Mrs. Baker, whose property was taken. The principle involved does not depend on the accident of ownership, nor the chance of the nature of the improvement. Equally fallacious is the reasoning of the New York court when it says that the object of opening a street may in special cases be, not to benefit the abutting land, but to afford access and communication between separate parts of the city or village, and thus inure to the advantage of the whole municipality, and that,

therefore, a distinction is to be made between a street-opening case and one involving the cost of a pavement. The vice of this argument is the same as that of the position taken by the Missouri courts and those of other states which refuse to follow the Norwood case—it assumes too much and proves too little. It assumes that the same thing (affording access to separate parts of the town) can not be the object of building a pavement or sidewalk, but it does not show the reason. And so, in the case at bar, the Missouri court assumed that some difference in the nature of the improvement for which the tax is levied required a different construction of the basic principle, but gave no reason for such a conclusion.

Shortly after the decision in the Norwood case, Judge Phillips, sitting in the United States Circuit Court, at Kansas City, had occasion to apply the test to the Missouri statutes authorizing special taxation, which, it may be said, are no different from the St. Louis charter, so far as the objection now urged is concerned, and the result of his deliberations was a very able opinion, holding the assessment void.

Fay v. Springfield, 94 Fed. 409.

The case was submitted upon an application for a preliminary injunction to restrain the issue of tax bills, and it was asserted that the ordinance providing for the assessment was void, for the same reasons we urge in the case at bar. That the exact point in controversy here was determined there, may be seen from a comparison of the statutes relating to such assessments with the similar provisions of the St. Louis charter.

Every possible effort was made by counsel for defendants in that case to avoid the controlling effect of the Norwood decision. It was pointed out that the ruling was made in a street opening case and was therefore not in point in the case of a tax for improvements; and that the statute of Ohio, under which that arose, was different from that of Missouri.

Answering this latter contention, the court said:

"How this difference in the two statutes is to help the defendants is not apparent. It only shows that it was in the mind of the legislature of Ohio, that the matter of apportionment of such burden could be predicated upon the basis of relative benefits bestowed upon the abutting property, or accord-

ing to the relative value thereof; whereas the Missouri statute contains no such provision whatever respecting betterments, or the relative value of the property touched. On the contrary, the Missouri statute provides absolutely, independent of any consideration of benefits conferred upon the lot-owner by the street improvement, and independent of any consideration of relative value of the property assessed, 'that the assessment shall be made, etc., in proportion to the front foot.' The Ohio statute further provided, in case an apportionment of the costs was directed on the basis of benefits, a method in advance of such assessment for ascertaining the benefits and apportioning the same."

These remarks fully dispose of the attempted distinction in this case.

The clear and concise opinion of Judge Phillips leaves so little to be said that further discussion of the questions involved would be but waste of time and space. Before dismissing the subject, however, we cannot refrain from inviting attention to these apt words of his:

"After thus recognizing the foundation of the rule of special assessments, it seems to my mind irreconcilably contradictory to say that the requirement is fully met by an apportionment based solely upon the frontage of lots on the street, without any regard whatever to the fact of whether or not the particular lot is benefitted at all by the work done throughout the length of the street improved, and without regard to the fact of whether or not the benefit bestowed is equal, as between all the lots fronting on the street."

And so it must seem to an impartial mind when the assessment is by the area rule for the construction of a sewer which drains a vast and populous district.

Following this case the decision of the Supreme Court of Texas, in the case of Hutcheson v. Storrie, 92 Texas, 685, which was an action upon a tax bill issued under the Charter of the City of Houston. Payment of the bill was resisted upon the ground that the provisions of the charter relating to such assessments and the resolution of the City Council for the particular assessment were unconstitutional, because the question of resulting equal benefits was ignored and the calculation made by a hard and fast rule admitting of no relaxation under any circumstances whatever. There was judgment against the

defendant below in conformity with a long line of State decisions approving such methods of assessment.

Pending the appeal the decision in the Norwood case was handed down, and the Supreme Court of Texas, recognizing the binding force of the decision of the United States Supreme Court, reversed the judgment and entered a decree for the defendant. The decision in this Texas case is interesting in the present discussion because it is so closely in point, as an examination will convince even the most doubtful.

In considering the arbitrary rule of assessment prescribed by the Houston Charter the court said: "There is no discretion lodged with the City Council in determining the assessment to be made upon the abutting property, but the Charter absolutely fixes the rule by which the assessment is to be governed and devolves upon the engineer the mere ministerial duty to ascertain by calculation what the work in front of the particular lot will cost, under the contract, according to the specifications. The law prescribed the standard to be the cost of work done in front of the lot, and the contract fixed the price. A calculation alone was necessary to ascertain the sum to be expended on the roll."

This is the vice of all these arbitrary assessments and it exists in the St. Louis Charter to even a greater degree. It will be noticed that the Houston Charter provided for something which the St. Louis Charter does not, the publication of a notice to all interested persons, after the assessment has been made, setting a time when objections might be urged, and to this extent at least it is less confiscatory than our own. Nevertheless, that faint spark of regard for property owners' rights failed to save it from condemnation.

In the later case of Lyon v. Tonawanda, 98 Fed. 363, the same facts called forth like rulings. There the court reviewed the Norwood case and applied it to the New York statute, discussing also Fay v. Springfield, heretofore commented upon. Of that statute it was said: "The New York law, in failing to provide any method for ascertaining and apportioning benefits, resembles the Missouri statute considered in the Fay case, *supra*, more closely than the Ohio statute."

Of like effect was the opinion in Charles v. City of Marion,

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98 Fed. 166, where Judge Baker granted a temporary injunction against a special tax assessment on the same grounds.

The Indiana statute involved in that case was of the same nature as the St. Louis Charter, save that it, like the Houston Charter, provided for a notice and hearing of objections after the assessment had been made. The opinion loses none of its persuasive force because delivered on an application for a temporary injunction, and those who criticize it upon that ground pay but small compliment to the eminent jurist who wrote it.

The same ruling was made in Loeb v. Trustees, 91 Fed. 37.

Again, in Parker v. Detroit, 103 Fed. 357, the Norwood case was followed, and the Circuit Court, after summing up the provisions of the Detroit Charter, sustained the claim of complainants that the system of assessment was illegal on the same objections as here urged against the St. Louis Charter, and said:

"The case of Norwood v. Baker is the foundation for this position, and seems fully to sustain it."

It there appeared that the Charter of Detroit authorized the assessment of the entire cost of the improvement upon the property in the taxing district and the apportionment of the tax by the front-foot rule, but no tribunal was empowered to review the assessment or the apportionment, or to correct any hardships which might result from that rule. These were the grounds for the application of the principles announced in the Norwood case, and they are present in more aggravated form in the case at bar.

In Indiana the Norwood case has been recognized and followed. The case of Adams v. Shelbyville, 154 Ind. 467, presented to the Supreme Court of that state the same questions here in dispute, although the facts of the case were much more different from those of the Norwood case than are the facts of that now at bar. That court held that while the legislature may declare conclusively that only the property in the taxing district shall be specially assessed for the cost of a local improvement within the district, yet the district as a whole can be assessed only to the extent of the resulting benefits, and those benefits must be apportioned upon the several lots according to the benefit derived by each; that any excess of cost

must be borne by the city at large, and that in all such cases the property owners are entitled to a hearing on the question of benefits.

Tested by the rule thus stated, it will be seen that the Charter of St. Louis falls far short of the requirements of validity. It goes further than any statute or charter examined and judicially condemned in all of the cases which follow the doctrine of the Norwood case. It not only determines conclusively that the property in the taxing district is benefitted, but also that the benefit as a whole is equal to the cost of the improvement and that each lot is benefitted in proportion to its size. It authorizes an "illegal assessment under a rule or system which violates the constitution, in that the entire cost is imposed upon the property taxed without any reference to special benefits." It prescribes a hard and fast rule of mathematical computation.

All that need or can be done in making the assessment is a mere matter of simple arithmetic, the calculation of the total square feet in the district and of the number contained in the lot, the addition of the cost and its division in the ratio of the lot's area to that of the district. It needs no unusual degree of mental ability to discover that in such procedure the question of relative benefits can have no place. It is the size of the lot, not the benefit bestowed, which determines the amount of the tax. Any other consideration is absolutely excluded.

Moreover, even were it possible to consider the matter of benefits, that matter could not affect the result. The legislative determination is quite as binding upon those who assess as on those who have to pay. Had the Board of Public Improvements assessed any other sum than that resulting from the mathematical calculation, the whole assessment would have fallen. That body had no power to raise or lower any particular assessment, but could only make the calculation. Nor could the property owner obtain relief from unfair assessment in any other tribunal. He could not defend on the ground that his property was not benefitted.

Such was the ruling of the Supreme Court of Missouri in the case of Keith v. Bingham, 100 Mo. 300; Nevada v. Eddy, 123 Mo. 546, and many others, and that is still the law in Missouri.

The opinion of that Court in Bank v. Carswell, 126 Mo. 436, is not to the contrary, because, in that case, the assessment was not by the front-foot or area rule, but according to the assessed value of each lot. But even if the latter opinion is in conflict with what that court had previously held, it would be, in the words of Judge Phillips, "a remarkable achievement of tergiversation." (*94 Fed. 419, l. c.*)

Every opportunity to resist confiscation of private property was cut off from property owners. The city authorities were powerless to grant them relief and the courts refused their aid, leaving them helpless victims of this "governmental function."

Even if the ordinances and the charter of St. Louis provided for the most solemn notice to the property owners, the constitutional requirements would remain unsatisfied unless provision was made for the correction, by some competent tribunal, of erroneous or oppressive assessments.

Williams v. Supervisors, 21 Fed. 99.

But the inherent vice of the charter and the ordinances which follow it, as said Judge Phillips in the Fay case, "lies in the unbridled discretion conferred upon the municipal council, and the impossibility thereunder of judicially ascertaining what was in the mind of each member of the board in making the assessment."

Viewed in the light of the authorities cited, and considered in connection with the rule established by the decisions of the courts of last resort in Missouri, the Charter of the City of St. Louis and the ordinances in question in this case are confiscatory in their nature and violative of the constitutional rights of the plaiutiff in error. Under these enactments, the area of the public streets and alleys is deducted from the area of the entire taxing district before the apportionment between the several lots is made, thus exempting the public property from any expense, while giving it the same benefits and advantages enjoyed by the private property taxed. In this manner the City of St. Louis receives benefits without contribution, and, under the guise of a betterment tax, the expense of performing the municipal duty in the drainage of streets and alleys is levied upon the property owner.

Out of a total of five hundred and twenty-five (525) acres in

the Vandeventer sewer district nearly one-fourth was streets and alleys, as the undisputed evidence shows, but nevertheless the cost of draining the entire five hundred and twenty-five (525) acres was assessed against those who owned but four hundred (400) acres. This fact, more eloquently than any argument, demonstrates the injustice and illegality of the assessments for sewer construction under the St. Louis Charter. Even under the rule laid down by the Supreme Court of Indiana in Adams vs. Shelbyville it is unconstitutional and void.

It is a matter of regret that innocent persons may have become involved in financial loss through the enactment of unconstitutional legislation, and that temporary inconvenience in the administration of public affairs may follow its condemnation as such, but the constitutional guarantees are of more importance than considerations of convenience to municipal corporations or those who contract with them on the faith of their unlimited power in charging the property of their citizens.

As said the Supreme Court of Texas: "Justice will be best preserved by upholding the limitations against the exercise of arbitrary power."

And so in this case, where the vice of the rule employed in making the assessment is even greater than that of the Ohio statute or the Charter of the City of Houston, where it appears that the very purpose of the legislation for assessment was to deprive the property owner of his inherent rights and to vest the city officers with a high prerogative of government, unrestricted by judicial interference, we respectfully submit that the judgment of the Supreme Court of Missouri should be reversed.

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